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No. 88-1701

In the Supreme Court of the United States

OCTOBER TERM, 1988

CLAUDE R. WILSON, JR., AND MODES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA AND ROBERT W. WALLACE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review a judgment of the court of appeals remanding to the district court for de novo review an action brought to enforce two summonses issued by the United States Customs Service.

2. Whether the temporary seizure by the Customs Service of the files of an attorney returning from abroad precludes enforcement of two Customs Service summonses, where the seizure of the files could not have had a material effect on the scope of the summonses.

3. Whether the district court abused its discretion in denying further discovery concerning the seizure, where petitioners had an opportunity to cross-examine a knowledgeable Customs Service official at an evidentiary hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A11) is reported at 864 F.2d 1219. The district court's order (Pet. App. A14-A16) and the magistrate's findings and recommendations (Pet. App. A17-A20) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A12) was entered on February 9, 1989. A petition for rehearing was denied on March 7, 1989 (Pet. App. A13). The petition for a writ of certiorari was filed on April 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who are an importer of jewelry from Asia and the importer's attorney, seek to block enforcement of two administrative summonses issued by the United States Customs Service.

1. In April 1985, the Customs Service served on petitioners administrative summonses seeking certain financial records of petitioner Modes that were necessary for an investigation of possible violations of the customs laws by Modes.[1] Petitioners sought an extension of time for compliance with the summonses so that petitioner Wilson, who is Modes' attorney, could travel to Asia (with an investigator) to secure relevant evidence. When Wilson and his investigator returned to the United States in May 1985, certain of Wilson's files pertaining to the Customs investigation were temporarily seized by Customs agents at the Dallas/Fort Worth International Airport. The files were returned two days later. Pet. App. A6, A19.

In August 1985, the Customs Service issued two new summonses directed to petitioners. The new summonses were identical to the ones previously issued, with one exception. The new summonses sought records for a narrower period of time (October 1983 to January 1985) than the original summonses (January 1983 to January 1985). Pet. App. A6, A18; 864 F.2d at 1221.[2]

2. After petitioners refused to provide the documents required by the summonses, the Customs Service com-

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[1] Pursuant to 19 U.S.C. 1509(a), certain Customs Service officials are empowered to summon persons "to produce records, required to be kept under [19 U.S.C. 1508], and to give such testimony, under oath, as may be relevant" to "any investigation or inquiry conducted for the purpose of * * * insuring compliance with the laws of the United States administered by the United States Customs Service."

[2] The appendix to the petition for a writ of certiorari contains a typographical error at this point. See Pet. App. A6 (reprinting court of appeals opinion to state that new summonses requested records from the period, "10/82 – 1/85"). The court's opinion states, correctly, that the new summonses sought records from the period, "10/83 – 1/85." 864 F.2d at 1221. See also Pet. App. A10 (new summonses covered "shorter time period" than original summonses).

menced enforcement proceedings in district court pursuant to 19 U.S.C. 1510. Pet. App. A6-A7. The case was referred to a magistrate, who held an evidentiary hearing, issued findings of fact, and recommended that the summonses be enforced. *Id.* at A17-A20. The magistrate rejected petitioners' assertion that the Fifth Amendment privilege against compulsory self-incrimination covered the corporate documents that were sought in the summons. The magistrate also refused to entertain petitioners' blanket claim of an attorney-client privilege, directing petitioners to make any such claim on a document-by-document basis and in greater detail. *Id.* at A19-A20. In addition, the magistrate found that the documents taken at the airport "were not copied, memorized, read, transcribed, retained, or otherwise kept by the United States Customs Service or any other government agency" and that the May 1985 airport incident "ha[d] no bearing on the lawfulness of the investigation at hand or on the summonses at issue." *Id.* at A19.

The district court reviewed the magistrate's findings under the "clearly erroneous" standard of review. The court adopted the magistrate's report and recommendations in full. It therefore enforced the summonses. Pet. App. A14-A16.

3. The court of appeals set aside the district court's decision, ruling that the district court erred in applying the "clearly erroneous" standard in reviewing the magistrate's findings and recommendations. Pet. App. A7-A8. The court of appeals remanded the case with instructions that the district court "review the magistrate's ruling on the [summonses] *de novo*." *Id.* at A8. The court of appeals therefore did not decided whether the summonses should be enforced.

The court then outlined the law to be applied on remand. Pet. App. A8-A11. The court explained that the general test for enforcement of an administrative subpoena requires the government to show that the following elements

have been satisfied: "(1) There must be a legitimate purpose of the investigation; (2) the specific inquiry must be relevant to that pu[r]pose; (3) the information sought must not already be in the government's possession; and (4) all internal administrative procedures must have been followed." *Id.* at A8 (relying on *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964)).[3] The court stated that the burden would then shift to the defendant to challenge the summonses on "any appropriate ground," including a showing that enforcement "would represent an abuse of the summons process." Pet. App. A9.

The court ruled that, in this case, petitioners could not make out an abuse of process defense. The court observed that the "thrust" of petitioners' argument that an abuse of process occurred was that "the airport seizure of the documents was an illegal search and seizure, in violation of the fourth amendment, that enabled the government to make wrongful discoveries." Pet. App. A9. The court reasoned, however, that petitioners could not establish a necessary element of the defense here–that the summonses were the result of the airport incident. Thus, at the time of the airport seizure, Customs had two outstanding summonses that apparently covered the seized documents, and the summonses issued after the seizure "also covered these papers and were identical except for the shorter time period covered." *Id.* at A10. Because "[t]he description of the documents was fashioned prior to the incident at the airport, as was Customs's effort to obtain the documents," the court concluded that petitioners could not "establish that the 'subpoenas are the result of the . . . allegedly improper access

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[3] Although *Powell* involved an Internal Revenue Service investigation, the court found the test applicable to the Customs Service summonses at issue here as well. Pet. App. A8 (citing *United States* v. *Frowein*, 727 F.2d 227, 230 (2d Cir. 1984)). See also *In re Clubman, Inc.*, 532 F. Supp. 92, 95 (D.P.R. 1982).

. . . .'" *Ibid.* (quoting *SEC* v. *ESM Government Securities, Inc.*, 645 F.2d 310, 318 (5th Cir. 1981)). "Under these circumstances," the court concluded (Pet. App. A10), petitioners had no abuse of process defense, "irrespective of how distasteful the events at the airport may have been." Accordingly, while leaving it "entirely in the hands of the district court to make the requisite findings and intimat[ing] no view as to them," the court of appeals stated that if the district court found on remand that the government had satisfied the *Powell* factors, the summonses could be enforced. *Ibid.*

Finally, the court rejected petitioners' arguments that they were entitled to more discovery on whether the government had the information sought by the summonses at the time the summonses were issued. Noting that petitioners "make[] much of such mundane matters as the court's quashing [their] request to depose [Customs Special Agent] Wallace in favor of relying on his in court testimony," the court found it "not at all clear that the intended discovery was so important that its denial was egregious." Pet. App. A11. The court therefore held that the district court did not abuse its discretion in denying additional discovery on the issue. *Ibid.* The court noted, however, that "of course on remand the district court is free to make whatever further discovery rulings it deems appropriate." *Ibid.*

ARGUMENT

1. The judgment of the court of appeals is interlocutory, as the court of appeals did not decide whether the government should prevail in its action to enforce the summonses, but instead remanded the case for the district court to rule on that question. It has been long settled that this Court ought not review an interlocutory court of appeals judgment, "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). That the judgment

below is interlocutory "itself alone" is sufficient reason to deny the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Ry.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

In this case, the court of appeals remanded the case to the district court for de novo review of the magistrate's decision (Pet. App. A8) and stated that the trial court was "free to make whatever further discovery rulings it deems appropriate" (*id.* at A11). At this stage of the litigation, therefore, it is unclear whether Customs' summonses will ever be enforced. To be sure, the court of appeals' determination that petitioners do not have a valid abuse of process claim (*id.* at A9-A10) constitutes the law of the case, but petitioners would not be barred from later challenging that determination in this Court–if the district court ultimately enforces the summonses and the court of appeals affirms. *Hamilton-Brown Shoe Co.*, 240 U.S. at 258-259. See *Christianson* v. *Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2178 (1988). Accordingly, there is no reason for this Court to depart in this case from its firmly established practice of declining to review interlocutory decisions.

2. In any event, the issues petitioners raise in challenging the court of appeals' decision do not warrant this Court's consideration. The court of appeals correctly resolved those issues, and the decision does not conflict with the decisions of this Court or of any other court.

a. Petitioners argue (Pet. 6-7) that the Customs Service's summonses should be held unenforceable "in order to show the Customs Service that the duty to search for contraband does not justify the violation of clear constitutional rights." As petitioners acknowledge (Pet. 4-5), however, one month before the May 1985 seizure at the airport, the Customs Service had issued summonses covering all of the documents covered by the August 1985 post-seizure

summonses that are at issue in this case; indeed, the post-seizure summonses were identical to the earlier ones, except that they covered a contracted period of time. Accordingly, even if petitioners could establish that the airport seizure violated their rights, they cannot show that any such violation had an adverse effect on the scope of the summonses issued to them.[4]

Not even petitioners contend that any governmental misconduct at any stage of an administrative investigation automatically immunizes a party from further legitimate inquiry. Rather, as the court of appeals ruled (Pet. App. A9), government misconduct is no ground for invalidating a summons unless, at a minimum, there is a causal connection between the misconduct and the issuance or scope of the summons. In this case, there is no such connection, because petitioners were already under an obligation to respond to materially identical summonses prior to the airport seizure.

Petitioners suggest that the decision below is inconsistent with the decisions in *United States* v. *King*, 724 F.2d 253 (1st Cir. 1984), *United States* v. *Irwin*, 612 F.2d 1182 (9th Cir. 1980), and *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978). Each of those cases, however, involved a claimed violation of the Sixth Amendment right to counsel in a criminal case. In contrast, the Customs Service summonses are not part of and do not trigger an adversary criminal proceeding, and therefore the Sixth Amendment does not apply. See *Tornay* v. *United States*, 840 F.2d 1424, 1429 (9th Cir. 1988) (IRS summons). See U.S. Const. Amend. VI ("In all *criminal* prosecutions, the ac-

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[4] That conclusion is bolstered by the magistrate's findings that the documents seized at the airport "were not copied, memorized, read, transcribed, retained, or otherwise kept" by the government and that the seizure "has no bearing on the lawfulness of the" summonses. Pet. App. A19.

cused shall enjoy the right * * * to have the assistance of counsel for his defence.") (emphasis added).[5] Moreover, even in the Sixth Amendment context, an intrusion into the attorney-client relationship does not require dismissal of the case where the intrusion clearly was not prejudicial. See, *e.g.*, *United States* v. *Morrison*, 449 U.S. 361 (1981); *Weatherford* v. *Bursey*, 429 U.S. 545, 552 (1977); *United States* v. *Irwin*, 612 F.2d at 1187 (requiring "substantial[] prejudice[]").[6] In this case, even if the seizure of petitioner Modes' documents from petitioner Wilson, Modes' attorney, interfered with the attorney-client relationship, the seizure in no way prejudiced petitioners in this summons-enforcement proceeding.

b. Petitioners also complain (Pet. 7) that they were denied adequate discovery. As petitioners acknowledge (Pet. 5), however, at the hearing before the magistrate they had the opportunity to cross-examine Customs Service Special Agent Wallace concerning the airport seizure, and they

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[5] In this case, the magistrate found (Pet. App. A19) that "[t]he Customs Service investigation has not been referred to the Department of Justice for criminal prosecution, and there is no institutional commitment on the part of the Customs Service to proceed criminally with respect to either or both [petitioners]." See *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 318 (1978).

[6] The court in *United States* v. *Levy* held that prejudice would be presumed where the intrusion resulted in "an actual disclosure of defense strategy," which became "public information" (577 F.2d at 210). Even if that presumption was proper in *Levy*, in this case there could be no basis for a presumption of prejudice. It is clear from the material identity of the pre- and post-seizure summonses that there was no prejudice. In addition, the magistrate found that petitioners' documents "were not copied, memorized, read, transcribed, retained, or otherwise kept by the United States Customs Service or any other government agency." Pet. App. A19.

did so. Petitioners do not specify what additional discovery they were precluded from conducting and how it would have benefitted them. In these circumstances, given the magistrate's and district court's wide discretion in supervising discovery, the legitimate concern with avoiding delay caused by needless proceedings, and the compelling proof of lack of prejudice based on the material identity of the pre- and post-seizure summonses, the court of appeals correctly held that limiting further discovery on the airport incident did not constitute an abuse of discretion. Certainly that holding does not raise any legal issue that is appropriate for this Court's review, and, in any event, the court of appeals ruled that the district court on remand is "free to make whatever further discovery rulings it deems appropriate." Pet. App. A11.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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